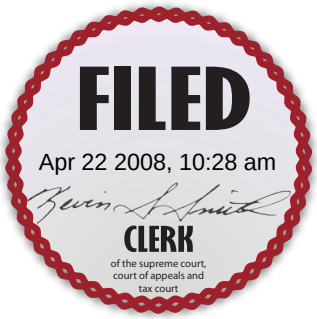

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IN THE
COURT OF APPEALS OF INDIANA

THEODORE JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0708-CR-688
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G17-0704-FD-058194

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Theodore Johnson appeals his convictions for strangulation as a class D felony,[1] two counts of domestic battery as class D felonies,[2] and his status as an habitual offender.[3] Johnson raises four issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain his convictions for strangulation and two counts of domestic battery;

II. Whether his convictions for two counts of domestic battery violate the prohibition against double jeopardy;

III. Whether the evidence is sufficient to sustain the finding that he is an habitual offender; and

IV. Whether the trial court's abstract of judgment accurately reflects his sentence enhancement for being an habitual offender.

We affirm in part, reverse in part, and remand.

The relevant facts follow. On March 28, 2007, Rasheeda Haskett was in her apartment with her five-year-old son and two-year-old daughter when Johnson, the father of the children, stopped by to see them. During the visit, Johnson asked the children if Haskett ever "had somebody over there," but the children did not respond. Transcript at 23. Later, Johnson found some paper under the couch and was trying to read it when Haskett put her hand over the paper, saying that it did not concern Johnson. Johnson jumped off the couch and punched Haskett several times in the face. While he was hitting Haskett, their daughter wrapped herself around Johnson's leg. Johnson placed his hand around Haskett's neck and choked her, then let her go and said, "[G]et your

[1] Ind. Code § 35-42-2-9 (Supp. 2006).

[2] Ind. Code § 35-42-2-1.3 (Supp. 2006).

[3] Ind. Code § 35-50-2-8 (Supp. 2005).

daughter, her nose is bleeding." Id. at 28. Haskett called a friend, but Johnson "got on the phone" and said that Haskett "wasn't going anywhere." Id. at 13.

Johnson went into Haskett's bedroom to retrieve some movies, threw his key to the apartment on the floor, and then, grabbing Haskett from behind, choked her again until she was dizzy and light-headed. Johnson let her go and walked out of the apartment. After Haskett closed the door behind him, Johnson dented it with repeated blows from a fire extinguisher he found outside. Haskett had bruising and a lump on her face and, at a hospital later that day, was treated for a fractured finger, an injury she received during the altercation.

The State charged Johnson with: (1) Count I, strangulation as a class D felony; (2) Count II, battery on a child as a class D felony;[4] (3) Count III, domestic battery in the presence of a child as a class D felony; (4) Count IV, domestic battery as a class A misdemeanor; (5) Count V, trespass a class A misdemeanor;[5] (6) Count VI, interference with reporting a crime as a class A misdemeanor;[6] (7) Count VII, battery as a class A misdemeanor; and (8) Count VIII, an enhancement of count IV, domestic battery as a class D felony for previous domestic battery conviction. The State later filed Count IX, an habitual offender enhancement, and dismissed the count of interference with reporting a crime. At the bench trial, Johnson testified that he and Haskett argued, and that he

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[4] Ind. Code § 35-42-2-1 (Supp. 2005) (subsequently amended by Pub. L. No. 99-2007, § 209 (eff. May 2, 2007) and Pub. L. No. 164-2007, § 1 (eff. July 1, 2007)).

[5] Ind. Code § 35-43-2-2 (2004).

[6] Ind. Code § 35-45-2-5 (2004).

retrieved his movies, threw his key on the floor, and left. He denied having a physical altercation with Haskett and denied that their daughter's nose was bleeding. The State presented evidence of Johnson's prior conviction for domestic battery to enhance Count IV to a class D felony. The trial court acquitted Johnson of Count V, trespass as a class A misdemeanor, and found him guilty of the remaining charges.

The trial court addressed the habitual offender enhancement, and the following exchange took place:

> THE COURT: As to the Habbitual [sic], count nine, is there any stipulation on this?
>
> [Prosecution]: Well, judge, my IDENT Officer indicated that these are a match so I've kept him here in case we need to try that part but,
>
> THE COURT: Do we have a stipulation or no?
>
> [Johnson's Attorney]: Yes, Judge.
>
> THE COURT: We do?
>
> [Johnson's Attorney]: Yes.
>
> THE COURT: So you stipulate that,
>
> [Johnson's Attorney]: He is the same person.
>
> THE COURT: All right.
> [Prosecution]: Can I release him then?
>
> THE COURT: Yes.
>
> [Prosecution]: Thank you, Officer.
>
> THE COURT: Thank you, Officer. All right so I'll find him guilty as to count nine as well.

Id. at 66-67. The trial court then set a date for the sentencing hearing.

Johnson filed a motion to reconsider verdict, and, at a hearing on the motion, the trial court acquitted Johnson of Count II, battery on a child as a class D felony. At the sentencing hearing, in light of double jeopardy concerns, the trial court merged Count IV, domestic battery as a class A misdemeanor, Count VII, battery as a class A misdemeanor, and Count VIII, domestic battery as a class D felony for previous domestic battery conviction. The trial court entered judgments of conviction for: Count I, strangulation as a class D felony; Count III, domestic battery in the presence of a child as a class D felony; Count VIII, domestic battery with prior conviction for domestic battery as a class D felony; and the court found that Johnson was an habitual offender. The court sentenced Johnson to 730 days with 185 days suspended for strangulation as a class D felony, 730 days with 185 days suspended for both counts of domestic battery as class D felonies, to run concurrently to each other but consecutive to the sentence for strangulation, and enhanced the sentence by one and one-half years for the habitual offender enhancement, to be served consecutive to the other sentences. Thus, the trial court sentenced Johnson to an aggregate executed sentence of 1635 days in the Indiana Department of Correction.

I.

The first issue is whether the evidence is sufficient to sustain Johnson's convictions for strangulation and two counts of domestic battery. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the

verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

Ind. Code § 35-42-2-9 provides that a "person who, in a rude, angry, or insolent manner, knowingly or intentionally . . . applies pressure to the throat or neck of another person[] or . . . obstructs the nose or mouth of the another person . . . in a manner that impedes the normal breathing or the blood circulation of the other person commits strangulation, a Class D felony." Thus, to convict Johnson of strangulation, the State needed to prove that he knowingly or intentionally applied pressure to Haskett's throat or neck or obstructed her nose or mouth in a rude, insolent, or angry manner, and that he impeded her normal breathing or blood circulation.

Ind. Code § 35-42-2-1.3 provides in relevant part that a "person who knowingly or intentionally touches an individual who . . . has a child in common with the other person . . . in a rude, insolent, or angry manner that results in bodily injury to the [other] person . . . commits domestic battery, a Class A misdemeanor." The offense is a class D felony if the offender "has a previous, unrelated conviction" for domestic battery or if the offense was committed "in the physical presence of a child less than sixteen . . . years of age, knowing that the child was present and might be able to see or hear the offense." See Ind. Code § 35-42-2-1.3. Thus, to convict Johnson of both counts of domestic battery as a class D felony, that State needed to prove that he knowingly or intentionally touched Haskett in a rude, insolent, or angry manner resulting in bodily injury to Haskett, that he had a child in common with Haskett, that the offense was committed in the

physical presence of a child, and that Johnson has a prior unrelated conviction for domestic battery.

The State presented evidence sufficient to support Johnson's convictions. Although Haskett was the only witness who testified as to the actual physical altercation with Johnson, the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. Toney v. State, 715 N.E.2d 367, 369 (Ind. 1999). Johnson argues that Haskett was biased, but the trial court found her testimony more credible, and we do not judge the credibility of witnesses. See Jordan, 656 N.E.2d at 817. Accordingly, given the facts of the case, we conclude that the State presented evidence of probative value from which a reasonable trier of fact could have found Johnson guilty beyond a reasonable doubt of strangulation as a class D felony and two counts of domestic violence as a class D felony. See, e.g., Cox v. State, 774 N.E.2d 1025, 1029 (Ind. Ct. App. 2002) (holding that the evidence was sufficient to convict defendant of domestic battery).

II.

The next issue is whether Johnson's convictions for two counts of domestic battery as class D felonies violate the prohibition against double jeopardy. The State concedes that Johnson's convictions "may violate the principles of double jeopardy." Appellee's Brief at 6.

The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. Art. 1, § 14. The Indiana Supreme Court has noted that conviction and punishment for a crime that consists of the very same act as another

crime for which the defendant has been convicted and punished violate Indiana's double jeopardy clause. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring)). "An example of this situation is Jones v. State, 523 N.E.2d 750, 754 (Ind. 1988) (vacating a battery conviction because the information showed that the identical touching was the basis of a second battery conviction)." Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring).

Here, the State charged Johnson with both battery as a class D felony in the presence of a child and battery as a class D felony for a previous domestic battery conviction. Although, at sentencing, the trial court merged other battery and domestic battery counts, the trial court suggested that the two D felony counts would not merge because one count required proof that a child was present. However, both D felony counts arise from the same act, namely, that Johnson punched Haskett in the face resulting in bruising and a lump to her face. Thus, because the same behavior formed the basis for conviction and punishment on two counts of domestic battery, we conclude that the entry of judgments of conviction on both counts of domestic battery as class D felonies violates the prohibition against double jeopardy, and we remand with instructions to vacate one of the convictions.[7] See, e.g., Lawson v. State, 803 N.E.2d 237, 243 (Ind. Ct. App. 2004) (holding that defendant's two convictions for the same behavior violated double jeopardy principles), trans. denied.

[7] Johnson also argues that his convictions for two counts of domestic battery violate the Fifth Amendment prohibition against double jeopardy. Because we remand with instructions to vacate one of the convictions under the Indiana Constitution, we need not address Johnson's argument.

III.

The next issue is whether the evidence is sufficient to sustain the finding that Johnson is an habitual offender. Ind. Code § 35-50-2-8 provides that "the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions." "To establish that the defendant is an habitual offender, the State must prove beyond a reasonable doubt that the defendant has been previously convicted of two separate and unrelated felonies." Firestone v. State, 838 N.E.2d 468, 472 (Ind. Ct. App. 2005) (citing Ind. Code § 35-50-2-8). Certified copies of judgments or commitments containing a defendant's name or a similar name may be introduced to prove the commission of prior felonies. Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002) (citing Hernandez v. State, 716 N.E.2d 948, 953 (Ind. 1999), reh'g denied). While there must be supporting evidence to identify the defendant as the person named in the documents, the evidence may be circumstantial. Id. If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was a defendant who was convicted of the prior felony, then a sufficient connection has been shown. Id.

Here, with respect to Johnson's prior unrelated felony convictions, the State alleged in Count IX:

> On or about June 28, 1995, in Marion County Superior Court Criminal Division Five, State of Indiana, one THEODORE JOHNSON was convicted of Burglary, a Class B Felony, and

> On or about February 11, 1997, in Marion County Municipal Court Criminal Division Nine, State of Indiana, one THEODORE JOHNSON was convicted of Theft, a Class D Felony, and
>
> On or about May 17, 2002, in Marion County Superior Court Criminal Division Nine, State of Indiana, one THEODORE JOHNSON was convicted of theft, a Class D Felony . . . .

Appellant's Appendix at 41. At the bench trial, following a lengthy explanation by the court as to its findings as to the charged counts, the following exchange occurred:

> THE COURT: I've already ruled on count seven. Count eight, I'm going to find that the State has met its burden and find the Defendant guilty as to count eight and I do believe that the State has proven that they have, the issue that on or about August 16th of 2005, that the Defendant did, had a previous conviction for battery out of Superior Court 16 under cause number 04226639, that was on August 16th, 2005. They submitted Defense Exhibit, I think it was two, which was a certified copy of that conviction. I'm going to find the Defendant guilty of count eight as well. As to the Habbitual [sic], count nine, is there any stipulation on this?
>
> [Prosecution]: Well, judge, my IDENT Officer indicated that these are a match so I've kept him here in case we need to try that part but,
>
> THE COURT: Do we have a stipulation or no?
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> [Johnson's Attorney]: Yes, Judge.
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> THE COURT: We do?
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> [Johnson's Attorney]: Yes.
>
> THE COURT: So you stipulate that,
>
> [Johnson's Attorney]: He is the same person.
>
> THE COURT: All right.
>
> [Prosecution]: Can I release him then?
>
> THE COURT: Yes.
>
> [Prosecution]: Thank you, Officer.

> THE COURT: Thank you, Officer. All right so I'll find him guilty as to count nine as well.

Transcript at 66-67. Johnson argues that this exchange is too vague to be a stipulation of guilt, and, therefore, that the State did not present sufficient evidence to sustain the finding that he is an habitual offender. We disagree.

The prosecutor had retained an officer to aid in trying Johnson on the habitual offender count. At a moment in the bench trial when the court was clearly inquiring as to the habitual offender count, the court asked Johnson's attorney if they had a stipulation, and Johnson's attorney answered, "Yes." Id. at 67. The prosecution then released the officer, who presumably would have provided supporting evidence identifying Johnson as the person who committed the prior unrelated felonies alleged by the State, and the court then found Johnson guilty of being an habitual offender. Johnson's attorney made no objection to this finding, made no objection when the trial court later sentenced Johnson for being an habitual offender, and likewise did not object in the motion to reconsider verdict, all of which is behavior consistent with Johnson's having stipulated to being an habitual offender. Having invited the State to rely on this stipulation, Johnson may not now take advantage of the State's decision not to present additional evidence of his prior convictions. See Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005) ("Under the doctrine of invited error, a party may not take advantage of an error [he] commits, invites, or which is the natural consequence of [his] own neglect or misconduct."). Accordingly, we affirm the finding that Johnson was an habitual offender.

IV.

The last issue is whether the trial court's abstract of judgment accurately reflects Johnson's sentence enhancement for being an habitual offender. Johnson contends, and the State concedes, that the abstract of judgment incorrectly recites an habitual offender enhancement of 730 days with 545 days executed and 185 days suspended, when, in fact, the trial court sentenced Johnson to one and one-half years on the enhancement. In light of this disparity, we also remand to the trial court with instructions to issue a corrected abstract of judgment.

For the foregoing reasons, we affirm Johnson's convictions for strangulation as a class D felony, one count of domestic battery as a class D felony, and his status as an habitual offender, and we reverse and remand with instructions for the trial court to vacate one of the domestic battery convictions and to issue a corrected abstract of judgment.

Affirmed in part, reversed in part, and remanded.

BARNES, J. and VAIDIK, J. concur